



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

February 11, 2021

Jena Shoaf Acos
City Attorney
City of Carpinteria
Brownstein Hyatt Farber Schreck, LLP
1021 Anacapa Street, 2nd Floor
Santa Barbara, CA 93101

Re: Your Request for Advice
Our File No. A-20-154

Dear Ms. Acos:

This letter responds to your request for advice on behalf of Jason Rodriguez, a member of the City of Carpinteria Architecture Review Board (“ARB”) regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Government Code Section 1090. Please note that we do not advise on any other area of law, including the Public Contract Code or common law conflicts of interest.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

QUESTION

Would Board Member Rodriguez’s entering into a lease with the Developer for the Project’s café space constitute a conflict of interest under either the PRA or Section 1090?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

As an advisory board member, Board Member Rodriguez's potential lease with the Project Developer for a café space will not result in a violation of Section 1090 in this circumstance so long as he continues to recuse himself from any decisions related to the Project. As he must abstain from participating in the decision under Section 1090 if he desires to enter into a lease with the Project Developer, no analysis under the Act is necessary.

FACTS AS PRESENTED BY REQUESTER

The Surfliner Inn Hotel is a hotel project in the City ("Project") that was reviewed by the ARB during a joint concept review meeting with the Planning Commission and the City Council ("Concept Review") and will also be reviewed by the ARB pursuant to the City's standard development review process.

The Project is a hotel and restaurant project proposed by the Developer to be located at 499 Linden Avenue ("Property"), which is currently owned by the City and used as an Amtrak train station and public parking lot. If the Project is approved by the City, the Developer would enter into a long-term ground lease for the Property with the City ("Lease") and construct the Project.

As an initial step to explore this Project, on June 24, 2019, the City Council executed an exclusive negotiating agreement ("ENA") with the Developer. On March 9, 2020 and September 14, 2020, the City Council extended the ENA to September 20, 2020 and September 20, 2021, respectively. Neither Board Member Rodriguez nor the ARB participated in any way in the negotiation or execution of the ENA, or its extensions. The ENA restricts each party's ability to negotiate with third parties; therefore, the ENA bars the City from negotiating with other potential developers interested in a hotel project on the Property.

The ENA also provides that the City will process the Project through its standard development review process, subject to a few special procedures related to the negotiation of the ground lease. For example, on November 30, 2020, the ARB, Planning Commission, and City Council held a joint Concept Review of the Project prior to the City Council's consideration whether it wants to pursue negotiation of a Disposition and Development Agreement ("DDA") and Lease with the Developer.

The Concept Review provided the City with an opportunity to provide feedback to the Developer regarding the aesthetic design of the Project, as well as an opportunity for the City Council to receive information that may assist it in deciding whether or not to allow the Developer to file permit applications for the possible development of the Project on the City's Property. Because the Concept Review occurred prior to the filing of any application for entitlements it does not in any way bind the City to consider an application for an entitlement on the Property or, if an application is considered, bind the City to approve the application. Out of an abundance of caution, Board Member Rodriguez recused himself from the Concept Review on November 30, 2020.

The Developer is now expected to seek to negotiate a DDA and Lease with the City. A DDA is an agreement between the Developer and the City that establishes the consideration that the Developer will provide to the City for the privilege of being allowed to develop the Project on the

Property. The DDA will also provide that, if the Project is approved (pursuant to the City's standard development review process), the City will provide the Developer with the Lease for the Property on which the Developer will construct and operate the Project. The DDA will state that it does not constitute authorization to build the Project, and that, once the Developer files its application for entitlements and undergoes the City's standard development review process (and any associated environmental review) the City maintains full discretion to approve, approve with conditions, or deny the proposed Project.

Should the DDA be executed by the City Council and the Developer, the Developer will file an application for entitlements with the City and will commence the City's standard development review process for the Project. As part of this process, the ARB will review the Project and will provide a recommendation to the Planning Commission on whether the Project complies with the City's design standards. The Planning Commission would then review the Project and any associated environmental review and make a decision on the Project's application.

In making its final decision, the Planning Commission must consider the ARB's recommendations. Therefore, although the ARB is not a decision-making body, it does provide advice to the City's decisionmaking bodies. The ARB is not required to further review the Project unless requested by the City Council, Planning Commission, or the Community Development Director.

Following approval, the City will also enter into a Lease with the Developer for the Property, and the Developer may sublet the project café space. The terms of the Lease have not yet been negotiated, however, it is anticipated that the Lease will cover the 30,000 square foot Property, and will include a monthly "fixed" minimum rent as well as a "bonus rent" based on the gross revenues generated by the Project.

Board Member Rodriguez

Board Member Rodriguez was appointed by the City Council on February 24, 2020 to be one of five ARB members. He also is the owner and operator of The Food Liaison, a restaurant located in the City. As described above, the role of the ARB is to review and make recommendations concerning project designs both prior to and after application submittal.

In October 2020, Board Member Rodriguez received an email from a public relations consultant for the Developer, defined above as the "Initial Contact." The Initial Contact does not include any offer a financial arrangement and does not make any reference to leasing the potential café space in the Project. A similar email was sent to hundreds of City residents and business owners.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from

exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

With respect to the making of a contract, Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.) Thus, to the extent that the ARB, including Board Member Rodriguez, provides advice and recommendations regarding the Project’s compliance with the City’s design guidelines to the Planning Commission, Board Member Rodriguez would have participated in the review of the Project, as well as any subsequent contract he might enter into with the Developer.

Importantly, the Attorney General stated that neither it nor any court has ever “extended the proscription against making a contract by a board with a financially interested member to the situation of an advisory committee with a financially interested member.” (82 Ops.Cal.Atty.Gen. 126, 130 (1999).) “Rather, an advisory committee may perform its responsibilities as long as the interested member abstains and does not participate in the giving of advice.” (*Ibid.*; see also *Ueda* Advice letter, No. A-16-104.) “They are treated differently from boards responsible for executing the actual contracts under the governing statutes and policy reasons for the prohibition. Abstention by the interested member is allowed for the one, but not for the other.” (*Ibid.*)

Here, the Project is in the initial stages of the City’s standard development review process. You state that neither Board Member Rodriguez nor the ARB participated in any way in the negotiation or execution of the ENA, and that Board Member Rodriguez recused himself from the Concept Review on November 30, 2020. As an advisory board member, so long as he recuses himself from participating in the making of any and all decisions pertaining to the Project, Board Member Rodriguez would not have a prohibitive financial interest in a lease agreement with the Project Developer for a café space. In light of the conclusion that the board member must abstain from participating in the decision under Section 1090 if he desires to enter into a lease with the Project Developer, further advice under the Act is not necessary.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

ZWN:aja